Office Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

80-1446

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. _____

IRENE LAVIN,

Petitioner,

vs.

COMMITTEE OF BAR EXAMINERS OF THE STATE BAR OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

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QUESTIONS PRESENTED

1. Whether the "rational basis" standard for review of equal protection issues is insufficient and a type of "middle-tier" review more appropriate:

(a) where a state establishes a multi-stage procedure for admission to its bar;

(b) where an applicant passes each of three required examinations, spread over a period of at least three years; and

(c) where discriminatory grading rules are employed on the fourth and final examination.

2. Whether the reasons given by California in support of the rules for grading the final stage of its bar admission procedure provide a "rational basis" for the discriminatory nature of those rules.

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. _____

IRENE LAVIN,

Petitioner,

vs.

COMMITTEE OF BAR EXAMINERS OF THE STATE BAR OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

INTRODUCTION

An applicant for admission to the California bar faces many qualifying standards, including a two-part general bar examination where a 70 percent score is deemed passing. Applicants may opt to take the parts of the general examination at separate sessions. This petition raises constitutional issues concerning different and more onerous grading rules applied to applicants who exercise the latter option.

Petitioner has been denied admission to the California bar after achieving a passing score on every required examination except one portion of the two-part general examination. Her most recent scores on the two parts of the general examination were, in combination, above 70 percent and therefore sufficient to pass. Had she achieved those scores in a single session of the examination, the scores would have been combined and she would have been admitted to practice in California. However, for reasons which petitioner contends are constitutionally inadequate, California refuses to combine the scores of applicants who take the two parts of the general examination in separate sessions, requiring only those applicants to obtain a 70 percent or better score on each part.

QUESTIONS PRESENTED

1. Whether the "rational basis" standard for review of equal protection issues is insufficient and a type of "middle-tier" review more appropriate: (a) where a state establishes a multi-stage procedure for admission to its bar; (b) where an applicant passes each of three required examinations, spread over a period of at least three years; and (c) where discriminatory grading rules are employed on the fourth and final examination.

2. Whether the reasons given by California in support of the rules for grading the final stage of its bar admission procedure provide a "rational basis" for the discriminatory nature of those rules.

PARTIES TO THE PROCEEDING

The parties to this proceeding are stated in the caption. Petitioner is Irene Lavin. Respondent is the Committee of Bar Examiners of the State Bar of California (the "Committee").

OPINIONS BELOW

There are no reported opinions in this matter. The orders of repondent Committee and of the California Supreme Court are set forth in Appendices A, B and C.

GROUNDS FOR JURISDICTION

Petitioner seeks review of the November 26, 1980 order of the California Supreme Court denying her petition for a writ of review. Jurisdiction is conferred upon this Honorable Court pursuant to 28 U.S.C. § 1257, subd. (3).

CONSTITUTIONAL PROVISIONS INVOLVED IN THIS PROCEEDING

The constitutional provision involved in the present proceeding is contained in the Fourteenth Amendment, as follows:

> "Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunity of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

A. Procedural History.

Following notice that she had not passed California's Spring 1980 general bar examination, petitioner petitioned the Committee of Bar Examiners of the State Bar of California for admission to the practice of law, asserting, among other items, that her most recent scores on the two parts of the examination were sufficient, in combination,

to pass. On June 25, 1980, the Committee denied the petition. (See Appendix A.)

Petitioner filed a formal petition on July 3, 1980 for reconsideration. On July 26, 1980, the Committee granted the petition for reconsideration and, upon reconsideration, again denied the petition for admission to practice in California. (See Appendix B.)

Petitioner next filed a petition for writ of review with the California Supreme Court pursuant to Cal. Business & Professions Code § 6066 and Rule 952(c), Cal. Rules of Court. See also, *Chaney v. State Bar of California*, 386 F.2d 962, 966 (9th Cir. 1967). Respondent Committee filed an opposition and petitioner filed a reply. The California Supreme Court then denied the petition, without opinion, on November 26, 1980. (See Appendix C.)

B. Facts.

Prior to entering law school, petitioner passed an equivalency examination required by Cal. Business & Professions Code § 6060(c)(2) and Rule VIII, §§ 81 and 82, Rules Regulating Admission to Practice Law in California. The examination was required because petitioner's university credits and nursing school degree did not qualify her for exemption from the examination.

The next year petitioner also passed a first year law students' examination given by the Committee pursuant to Cal. Business & Professions Code § 6060(g) and Rule VI, § 61, Rules Regulating Admission to Practice Law in California.

Following her graduation from law school, petitioner passed one part of the final bar examination, known as the Professional Responsibility Examination, as required by Cal. Business & Professions Code § 6060(f) and Rule

XI, §§ 111, 113 and 114, Rules Regulating Admission to Practice Law in California.

Petitioner attempted on several occasions to pass the only remaining test, the general bar examination. The latter consists of two sections, the Multistate Bar Examination section (weighted 40 percent of the total score) and an essay section (weighted 60 percent of the total score). On the Fall 1979 California general bar examination petitioner received 437 of a possible 600 points or 72.8 percent, on the Multistate Bar Examination section. On the Spring 1980 general bar examination, she obtained 617.5 of a possible 900 points, or 68.6 percent, on the essay section. Petitioner's combined score on the two sections of the examination was 1,054.5 points of a possible 1,500, or 70.3 percent.

Respondent Committee applies two separate rules for achieving a passing grade on the general bar examination. An applicant who takes both sections of the examination at one session need achieve only a 70 percent score on the *combined* sections of the examination. However, an applicant who elects under the Committee's rules to take the sections of the examination in separate sessions is required to obtain a 70 percent or better score on *each* section in order to pass. Accordingly, an applicant who achieves an 80 percent score on the essay section and a 55 percent score on the Multistate section has a 70 percent overall score and passes the examination. In an extreme case, an applicant taking the examination in a single session can pass with 100 percent (900 points) on the essay section and *25 percent* (150 points) on the Multistate section! On the other hand, an applicant such as petitioner who achieves a higher overall score (1054.5 points) and with more consistency (72.8 percent and 68.6 percent), fails.

PRESENTATION OF FEDERAL QUESTIONS

The federal constitutional issues raised in this petition were presented in the petition for reconsideration addressed to the Committee of Bar Examiners and in the petition for writ of review with the California Supreme Court. The questions were based upon the same facts set forth in the present petition.

ARGUMENT

I.

THE "RATIONAL BASIS" STANDARD FOR REVIEW OF EQUAL PROTECTION ISSUES IS INSUFFICIENT WHERE A STATE (a) ESTABLISHES A MULTI-STAGE PROCEDURE FOR ADMISSION TO ITS BAR, (b) WHERE AN APPLICANT PASSES EACH OF THE FIRST THREE REQUIRED EXAMINATIONS AND (c) WHERE DISCRIMINATORY GRADING RULES ARE EMPLOYED ON THE FOURTH AND FINAL EXAMINATION.

A. The "Rational Basis" and "Strict Scrutiny" Standards For Review Of Equal Protection Issues Are Too Limited; "Middle-Tier" Review Is Frequently The Best Alternative.

There is a wide consensus that the two-tier approach ("rational basis" and "strict scrutiny") to review of equal protection issues is inadequate. Indeed, opinions of this Court have suggested that the system is unsatisfactory and have noted the Court's occasional application of what amounts to a "middle-tier" approach. See, for example, *Craig v. Boren* (1976) 429 U.S. 190, 210-211 (Justice Powell concurring):

> " . . . . [*Reed v. Reed*, 404 U.S. 71 (1971)] and subsequent cases involving gender-based classifications make clear that the Court subjects such classifications to a more critical examination than is normally applied when 'fundamental' constitutional rights and 'suspect classes' are not present. . . . As has been true of *Reed* and its progeny, our decision today will be viewed by some as a 'middle tier' approach. . . . "

Petitioner submits the time is ripe for overt recognition of each of the above facts. The ends of justice and the need for greater flexibility and realism in review of equal protection questions will be served.

Petitioner does not suggest that the "rational basis" standard should cease to be applied in the majority of cases which come before this Court. On the contrary, in most cases where fundamental constitutional rights and suspect classifications are not involved, the rational basis standard of review will no doubt lead to a just determination concerning a state's attempt to distinguish or "draw lines" between persons in similar circumstances. However, there are and always will be situations where a state's attempts at drawing lines or distinctions should be subjected to a more exacting examination. The alternative is to forego the opportunity for a realistic and just result in such cases. Conversely, to impose "strict scrutiny" in each of the latter instances will often lead to equally unrealistic and unjust ends. Overkill has no more place in attempts to protect constitutional rights than does neglect.

The solution, which can hardly be the subject of debate, is application of a middle-tier approach. The questions thus become what sort of approach or approaches to adopt and when to apply them. The scope and purpose of the present petition make it inappropriate to discuss all possible instances where a middle-tier approach might be

wise. However, California's discriminatory bar examination grading system is surely one appropriate instance because petitioner's situation falls between a procedurally simple licensing scheme, where a "rational basis" standard is applied, and a licensing rule based upon a suspect classification, invoking "strict scrutiny" review. Compare *Kotch v. Board of River Port Pilot Commissioners*, 330 U.S. 552 (1947) [Six-month apprenticeship requirement upheld under "rational basis" standard.]; *In re Griffiths*, 413 U.S. 717 (1973) ["Strict scrutiny" standard applied to review of Connecticut law precluding resident aliens from being admitted to bar.].

The examination procedure for admission to California's bar is neither simple nor expeditious. Rather, petitioner and other California bar applicants must pass several examinations, given over a period of years. For example, upon her entry into law school, petitioner was required to take an equivalency examination since her existing university credits and nursing school degree were not treated as the equivalent of a standard bachelor's degree. Next, petitioner was required to take a first year law students' examination at the conclusion of her initial year in law school. Following her graduation from law school, she was required to take a professional responsibility examination. Finally, she was required to take California's general bar examination which, in turn, consisted of two parts, the Multistate Bar Examination and an essay section. As noted previously, petitioner separately passed each and every required examination except the second (essay) portion of the general bar examination. Her combined scores on the two-part general examination were sufficient to pass but for the Committee's rules which forbid combining of her scores.

Petitioner submits that where a state requires an applicant for any license to take a series of qualifying

examinations over a period of years, application of the mere "rational basis" standard of review to discriminatory grading rules on the last of those examinations is woefully inadequate. A state simply should not be allowed to subject an applicant to many years of differing tests and examinations without bearing the concomitant burden of submitting its grading rules for the last of such examinations to more intensive review than "rational basis."

It is appropriate at this point to note that petitioner is not suggesting a lengthy, multi-step licensing procedure bestows upon an applicant, at some point in the process, a "vested" or "fundamental" right. Petitioner does assert, however, that by requiring such a lengthy undertaking of an applicant, a state should be deemed to subject any discriminatory grading rules applied at the end of the process to a standard of equal protection review more exacting than an easily met rational basis approach, since the latter is most commonly applied to a simple, one-step licensing process.

B. "Middle-Tier" Review Is Suitable To The Present Case.

Several types of "middle-tier" review of equal protection issues have been suggested by the cases and by commentators. For example, one type may be described as weighing the state's need for imposing the subject classification. Such an approach has been suggested in several cases, including *Hampton v. Mow Sun Wong*, 426 U.S. 88, 115-116 (1976) [argument of administrative convenience rejected when compared to the interest of the individual involved]; *Stanley v. Illinois*, 405 U.S. 645, 656 (1972) [" . . . establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher

values than speed and efficiency."]; *Vlandis v. Kline*, 412 U.S. 441, 458-459 (1973) [" . . . as the Court's assessment of the weight and value of the individual interest escalates, the less likely it is that mere administrative convenience and avoidance of hearings or investigations will be sufficient to justify what otherwise would appear to be irrational discriminations." (White, J., concurring in judgment)].

As discussed below, California has not sought to justify its discriminatory grading rules for its bar examinations on the basis of administrative convenience. Therefore, this particular middle-tier approach to review seems inapplicable here.

A second type of middle-tier review is to require modification of the challenged rule to permit exceptions in individual cases, without invalidating the rule in its entirety. In *Craig v. Boren, supra,* 429 U.S. 190, 199, the Court suggested such an approach in a case involving gender-based discrimination:

> "In light of the weak congruence between gender and the characteristic or trait that gender purported to represent, it was necessary that the legislatures choose either to realign their substantive laws in a gender-neutral fashion, or to adopt procedures for identifying those instances where the sex-centered generalization actually comported to fact."

As with the first suggested method of middle-tier review, this approach appears unsuitable to the present case. If the challenged rule violates equal protection as to this petitioner, it should also be deemed to violate equal protection as to all others similarly situated.

A third technique, however, seems especially pertinent here. This approach would require the rationale for a

particular rule to be asserted by the state in the litigation in which the rule is challenged, based upon the origin and application of the rule, rather than permitting justification of the rule on the basis of a judicially created or conceivable rationale never offerred by the state in its defense. See *Griswold v. Connecticut*, 381 U.S. 479, 505 (1965) ["There is no serious contention that Connecticut thinks the use of artificial or external methods of contraception immoral or unwise in itself, or that the anti-use statute is founded upon any policy of promoting population expansion." (White, J., concurring.)]

This approach is the least onerous "middle-tier" technique since it provides for review of the challenged rule on the basis of reasons given and presumably considered by the originating state, denying the state only the fortuitous benefit it would obtain if the rule were approved for reasons that had no bearing on the enacting process.

The latter approach is most compatible to the situation existing in the present case. As discussed in Argument II, below, the State Bar of California has suggested specific reasons in support of a "rational basis" for its discriminatory grading rules. Petitioner contends that this Court should review those rules solely on the basis of the reasons given by the state. If those reasons constitute a "rational basis" for the discriminatory rules, then petitioner acknowledges the ultimate lack of merit of this petition. However, as will be demonstrated in Argument II below, the state's purported reasons do not provide such a rational basis and neither this Court nor any other court should attempt to discover and articulate other reasons on its own motion. Accordingly, certiorari should issue here and California's discriminatory grading rules for its bar examinations should be found to violate equal protection.

II.

CALIFORNIA'S COMMITTEE OF BAR EXAMINERS HAS NOT STATED ANY "RATIONAL BASIS" FOR ITS DISCRIMINATORY GRADING RULES.

Petitioner contends that respondent Committee has failed to state a rational basis for requiring those who take the two sections of the general bar examination in separate sessions to achieve separate passing scores while permitting those who take the parts in one session to combine their two scores to achieve a passing grade.

Before discussing the reason given by the Committee as a purported rational basis for its discriminatory grading rules, petitioner briefly summarizes relevant standards which have been applied to state administered bar examinations.

In *Schware v. Board of Bar Examiners of State of New Mexico*, 353 U.S. 232, 238-239 (1957), this Court articulated the basic requirements imposed by the Fourteenth Amendment upon the state's rules regulating admission to the practice of law:

> "A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment. [Citations.] A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law. [Citations.]"

Under the above principles, it has been held that an essay-type bar examination "has a rational connection

with the capacity to practice law . . . . " *Chaney v. State Bar of California*, 386 F.2d 962, 964 (9th Cir. 1967). However, a limitation on the number of times an applicant may take a state's bar examination was declared unconstitutional in *Younger v. Colo. State Bd. of Bar Examiners*, 482 F.Supp. 1244, 1247 (D. Colo. 1980):

> " . . . . Yet, the application of a rule which effectively places a final limitation on the number of examinations an individual may take appears to be based upon an assumption that a given individual will never become competent. That amounts to a prejudgment of the examination results. It could also be considered to create an irrebuttable presumption of incompetence of the type which has been found to be constitutionally infirm in several cases. [Citations.]
>
> "There is no basis for faulting any standard requirements of additional study, training, or development prior to any re-examination. What is now declared unconstitutional is only the final preclusion of any opportunity for re-examination regardless of such requirements. That aspect of Rule 214 cannot be considered to have a rational connection with the compelling interest in requiring a demonstration of professional competence by successful completion of a written examination before admission to the Bar."

With the above rules in mind, we turn to the grounds given by respondent Committee in the present proceeding in support of the rule upon which petitioner's admission to the California bar was denied. In its opposition to issuance of a writ of review by the California Supreme Court, the Committee contended that the rule prohibiting the combining of scores from sections of the general bar examination taken separately was intended to prevent an applicant

from passing the examination as a result of a chance fluctuation in scores. As stated in a declaration filed in support of the Committee's opposition, "The requirement that only a passing status and not the score on a part be transferred across examinations was adopted so as to prevent an applicant from passing the [general bar examination] solely as the result of such chance fluctuation in scores. This requirement need not be imposed when an applicant takes the [two sections] concurrently, since it is highly unlikely that an applicant will be lucky on both parts at the same time." (Memorandum in Response to Petition for Review, Appendix C, Para. 9.)

The latter reasoning provides no rational basis for the discriminatory grading rules applied to petitioner. Neither the Committee's reasoning nor mathematical principles demonstrate that the probability of chance fluctuation in an applicant's scores on either or both parts of the general bar examination are in any way dependent upon whether the applicant takes the two parts at the same or different sessions. The Committee has in effect suggested that the laws of probability favor "heads" over "tails" in a given number of coin flips if, in a previous equal number of coin flips, tails prevailed over heads. No expertise in the laws of probability is necessary to recognize the fallacy in such reasoning. The laws of probability do not change with regard to coin flips or with regard to separate portions of an examination on the basis of preceding events.

In short, the Committee failed to demonstrate that an applicant's chances for passing the general bar examination are enhanced by the laws of probability where an applicant takes the two sections of the examination at separate sessions. Since this was the only argument offerred by the Committee as a rational basis for the discriminatory grading rules, petitioner submits that the

rules should be found to violate equal protection of the laws.

CONCLUSION

Respondent Committee has failed to establish any rational basis for placing a more onerous grading requirement upon bar applicants who opt to take California's general bar examination at separate sessions. As shown above, only those reasons offered by the Commmittee in support of the discriminatory grading rules should be considered in reviewing petitioner's equal protection contentions. This "middle-tier" approach to equal protection review is appropriate where, as here, California has established a lengthy, multi-stage procedure for admission to its bar.

Accordingly, petitioner respectfully requests that this petition for writ of certiorari be granted and that the discriminatory grading rules applied to California's general bar examination be declared unconstitutional.

Respectfully submitted,

EDWARD J. HOROWITZ,
A Professional Corporation

By EDWARD J. HOROWITZ

Attorney for Petitioner

APPENDIX A

THE COMMITTEE OF BAR EXAMINERS

OF THE STATE BAR OF CALIFORNIA

ARMANDO M. MENOCAL, III, *Chair*
SAN FRANCISCO
HERBERT J. SOLOMON, *Vice Chair*
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FRANCISCO CANCINO
SAN FRANCISCO
MARTIN R. GLICK
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MARY ANNE HARRISON
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SOUTH PASADENA
PATRICIA PHILLIPS
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SAN FRANCISCO
A. WALLACE TASHIMA
LOS ANGELES
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SAN FRANCISCO

JAMES B. TIPPIN, JR.
Executive Director
SAN FRANCISCO

June 25, 1980

Reply to:
☒ LOS ANGELES
☐ SAN FRANCISCO

NOTICE OF COMMITTEE ACTION

Ms. Irene Lavin
646 Woodruff Avenue
Los Angeles, California 90024

Assigned Petition No. 1(b)

Dear Ms. Lavin:

Please receive this as official notice that the Committee of Bar Examiners of the State Bar of California while It was in formal session in Monterey, California during June 20, 1980 denied the petition which you previously filed wherein you sought certification for admission to practice law in California pursuant to the provisions of the State Bar of California, Chapter 4, Division 3, of the Business and Professions Code.

COMMITTEE OF BAR EXAMINERS
James B. Tippin, Jr.
Executive Director

By _____
Suzanne M. Obermeier
(Original signed)
Director
Operations & Management

Date: June 25, 1980

SMO:ag

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APPENDIX B

THE COMMITTEE OF BAR EXAMINERS

OF THE STATE BAR OF CALIFORNIA

ARMANDO M. MENOCAL, III, *Chair*
SAN FRANCISCO
HERBERT J. SOLOMON, *Vice-Chair*
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FRANCISCO CANCINO
SAN FRANCISCO
MARTIN R. GLICK
SAN FRANCISCO
MARY ANNE HARRISON
BURBANK
ROBERT A. HINE
SOUTH PASADENA
PATRICIA PHILLIPS
LOS ANGELES
BERTRAM S. SILVER
SAN FRANCISCO
A. WALLACE TASHIMA
LOS ANGELES
WILLIAM H. WAYSMAN
OAKLAND
JOHN F. O'HARA, *Ex-officio member*
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National Conference of Bar Examiners

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Law School Accreditation
JOHN A. GORFINKEL, *Consultant*
SAN FRANCISCO

JAMES B. TIPPIN, JR.
Executive Director
SAN FRANCISCO

August 14, 1980

Reply to:
☒ LOS ANGELES
☐ SAN FRANCISCO

NOTICE OF COMMITTEE ACTION

Ms. Irene Lavin
646 Woodruff Avenue
Los Angeles, California 90024

Assigned Petition No. 1(e)

Dear Ms. Lavin:

Please receive this as official notice that the Committee of Bar Examiners of the State Bar of California while It was in formal session in Los Angeles, California during July 26, 1980 granted the petition which you previously filed wherein you sought a reconsideration of a previous denial and upon such reconsideration, denied your petition for admission to practice law in California.

COMMITTEE OF BAR EXAMINERS
James B. Tippin, Jr.
Executive Director

By _____

Suzanne M. Obermeier
(Original signed)
Director
Operations and Management

Date: August 14, 1980

JBT:sm

cc: Diane Alexander

APPENDIX C

SUPREME COURT
FILED
Nov. 26, 1980
LAURENCE P. GILL, Clerk

Deputy

ORDER DENYING WRIT OF REVIEW
L.A. No. 31336

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

IRENE LAVIN

v.

THE COMMITTEE OF BAR EXAMINERS,
THE STATE BAR OF CALIFORNIA.

Petition for writ of review DENIED.

BIRD *(Original signed)*
Chief Justice

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 3340 Ocean Park Boulevard, Suite 3005, Santa Monica, California 90405: that on February 24, 1981, I served the within *Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Santa Monica, California, addressed as follows:

Clerk, U.S. Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(Hand delivered; forty copies)

Clerk, California Supreme Court
350 McAllister Street, Room 4050
San Francisco, California 94102

Herbert M. Rosenthal
Truitt A. Richey, Jr.
State Bar of California
555 Franklin Street
San Francisco, California 94102

Robert M. Sweet
State Bar of California
1230 West Third Street
Los Angeles, California 90017

I declare under penalty of perjury that the foregoing is true and correct. Executed on February 24, 1981 at Santa Monica, California.

Kirk W. Harney
(Original signed)

Office-Supreme Court, U.S.
FILED
MAR 30 1981
ALEXANDER L. STEVAS
CLERK

In The

Supreme Court of the United States

October Term, 1980

No. 80-1446

IRENE LAVIN,
Petitioner,

vs.

THE COMMITTEE OF BAR EXAMINERS
OF THE STATE BAR OF CALIFORNIA,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California

RESPONDENT'S BRIEF IN OPPOSITION

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Attorneys for Respondent

QUESTION PRESENTED

Whether the Committee policy permitting the transfer of passing status achieved on different sections of the General Bar Examination over subsequent administrations, but prohibiting the transfer (i.e., the combination) of numerical scores achieved on the different sections at different administrations of the examination, operates to deprive petitioner of equal protection of the law.

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In the
SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-1446

IRENE LAVIN,

Petitioner,

vs.

THE COMMITTEE OF BAR EXAMINERS
OF THE STATE BAR OF CALIFORNIA,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of
the State of California

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, the Committee of Bar Examiners of The State Bar of California, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the order of the

Supreme Court of California. The Supreme Court order denied review of the determination of the Committee of Bar Examiners that petitioner should not be certified to the state high court for admission to practice law because she has not yet passed the final bar examination required to be taken and passed by all general applicants for admission.

RESPONDENT'S STATEMENT

Petitioner has been refused certification for admission to practice law in California because she has not passed the final California Bar Examination, as required by California statute, California Business and Professions Code section 6060(f). It is petitioner's contention that she was denied due process and equal protection of the law by the manner in which the Committee determined that she has not passed the examination.

Admittance to practice law in the State of California is by the Supreme Court of California following certification of eligibility by the Committee of Bar Examiners. (The Committee.)

The Committee is established by the Board of Governors of the State Bar pursuant to Business and Professions Code section 6046. Persons refused certification for admission by the Committee may petition to have that decision reviewed by the California Supreme Court in accordance with procedure adopted by that Court. Business and Professions Code section 6066, rule 952(c), California Rules of Court. This is the procedure followed by petitioner, but the Court declined to grant review.

The final bar examination consists of the General Bar Examination and the Professional Responsibility Examination.

Rule XI, Rules Regulating Admission to Practice Law in California.*

Petitioner first took the California General Bar Examination in July 1974. At that time, and at all relevant times since, the General Bar Examination has consisted of two parts: an essay examination and the Multistate Bar Examination (MBE).

From July 1974 to the February 1977 examination, the only way to pass the examination was to obtain a score of not less than 70% of the highest possible total of the combined essay and MBE portions of the examination. Although petitioner took the examination six times during this period (the examination is given twice a year), she failed to pass.

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* The Rules Regulating Admission to Practice Law in California have been adopted pursuant to provisions of the State Bar Act, California Business and Professions Code section 6000, et seq. See section 6047. The rules are set out in West's Annotated Business and Professions Code following section 6069.

In April 1977, the Committee adopted and announced that until further notice, there would be two methods of passing the examination. The first alternative is to pass the whole examination given at a single administration. To achieve this, an applicant must receive not less than 70% (currently 1050) of the total possible points (currently 1500) in the whole examination.

The second alternative is to pass the examination in sections. This may be accomplished by passing the MBE and essay sections separately at different administrations within a period of 21 months. Under this alternative, an applicant who receives a score of 70% or more on either the MBE (currently 420 points) or the essay (currently 630 points) section of a General Bar Examination administered in July 1979 or later, and who in any subsequent General Bar Examination taken within 21 months

after such earlier examination, will be deemed to have passed the entire examination. Numerical scores achieved on different sections of the examination at different administrations cannot be combined for any purpose. Thus, an applicant who may have received a higher score than 70% on one section cannot combine that score with a less than 70% score on the other section to claim a 70% or higher score on the whole examination.

Applicants are not required to make a formal election between the alternative methods. They may take either or both sections of the examination at any administration. An applicant who chooses to take the entire examination at a single administration will not be precluded from passing the examination in sections, and an applicant who chooses to take only one section of the examination will not be precluded from attempting to pass the

entire examination in a single administration at a later time. An applicant who has passed one section of the examination will not lose credit for doing so if the applicant subsequently retakes that section of the examination at a later administration and fails.

Although the second alternative method of passing the bar examination permits applicants to pass the examination by passing the MBE and essay sections at different times, the scores earned on different administrations of the MBE and essay sections may not be combined, even if the sum of the points scored exceeds the total score necessary to pass the examination at a single administration.

All applicants are fully informed of these alternatives by the Committee, and indeed petitioner included as exhibit A to her Petition for Review in the California Supreme Court a document dated February 1979

published by the Committee and entitled "Alternative Methods of Passing The California General Bar Examination" (Alternative Methods).

It is important to note that Alternative Methods contained the following advice to applicants:

> "To take maximum advantage of both methods of passing the General Bar Examination, it is recommended that an applicant take both the MBE and essay sections. Even if the applicant has previously passed one section of the examination, the Committee of Bar Examiners suggests that all applicants retake both the MBE and essay sections on any subsequent attempts. Taking only a single section limits the applicant's chances of passing to only a single method, rather than giving the applicant two alternative methods to pass the examination." (Emp. added.)

Alternative Methods, p. 2.

Since the July 1977 examination (the first one under the policy permitting taking the examination in sections), petitioner has taken the essay examination six times and failed to pass it. She has

taken the MBE three times and passed it in July 1977 and July 1979.*

In the fall 1979 General Bar Examination, the lowest possible passing score was 1050 points. The essay portion of the examination consisted of nine questions each worth 100 points for a total of 900 points. A passing score on this portion was 630 points (70% of 900). The total score possible for the MBE was 600 points with a passing score of 420 (70% of 600). At that examination, petitioner passed the MBE with a total of 437 points. However, on the essay portion of the examination she received only 577.5 points. She thus failed to pass the examination at one sitting because her total number of points was 1014.5 (1050 passing).

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* These facts were before the Supreme Court of California in the Declaration of Kenneth D. McCloskey, Director of Examinations for the Committee of Bar Examiners, attached as appendix B to respondent's Memorandum in Response to Petition for Review filed in the California Supreme Court proceedings.

Because petitioner had passed the MBE in fall of 1979, she could thereafter complete passage of the general examination by passing the essay portion of the examination within 21 months. She could also thereafter, as suggested by the Committee, take both portions of the examination again in an attempt to achieve an overall passing score of 70%. She could not, however, use the extra points obtained in the fall 1979 MBE to offset a possible deficiency occurring in a subsequent taking of the essay examination.

As previously stated, petitioner was not required to limit herself by retaking only the essay portion of the examination, and indeed the Committee's Alternative Methods publication suggested she do otherwise. Further, the Committee publication, Alternative Methods, specifically warns each applicant that "The numerical scores achieved on different sections of the

examination at different administrations are not combined for any purpose." (Emp. added.) Exhibit A, Petition for Review, filed with California Supreme Court.

In the spring of 1980, petitioner made the election of taking only the essay portion of the examination. On this examination petitioner received 617.5 points. As 630 points was necessary to pass the essay examination, she failed. Because she did not retake the MBE, she had no possible extra points to balance a 12.5 point deficit on the spring 1980 essay.

However, she now asserts that the constitution requires that the Committee combine her fall 1979 MBE numerical score (437 points) with her spring 1980 essay score (617.5 points).

Petitioner makes no claim that she was unaware of the Committee standards nor that she was misled by the Committee.

ARGUMENT

I

PETITIONER HAS SET FORTH NO GROUNDS THAT BRING HER PETITION WITH THE AMBIT OF RULE 17.

A review on writ of certiorari is not a matter of right, and will be granted only when there are special and important reasons therefor. Rule 17, Rules of the Supreme Court of the United States, sets forth nonexclusive guidelines as to what the Court considers in deciding whether to grant a writ of certiorari. The present case falls within none of these guidelines.

Since petitioner seeks review of a decision by the highest court of a state, rule 17.1(a) is inapplicable in that this particular portion of the rule pertains to decisions rendered by a federal court of appeals.

Petitioner's case also does not fall within rule 17.1(b) which indicates that a

writ of certiorari can issue when a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court or a federal court of appeals. Petitioner has cited no authority, federal or state, that indicates that the decision of the Supreme Court of California was in conflict with the decision of any other court.

Finally, this case does not come within the guidelines of rule 17.1(c); there is at issue no important question of federal law that requires settlement by this Court. The method by which Califorinia determines who is qualified to practice law before its courts is an issue that should be left to California in the absence of the violation of some overriding federal constitutional right of petitioner, and in this regard we respectfully submit petitioner's equal protection contentions are without merit.

II

THE RATIONAL RELATION TEST IS THE CORRECT STANDARD TO USE TO WEIGH EQUAL PROTECTION CLAIMS IN ATTORNEY ADMISSION PROCEEDINGS, AND THIS SHOULD NOT BE CHANGED.

Since Schware v. Committee of Bar Examiners of New Mexico, 353 U.S. 232, 239, 77 S.Ct. 752, 756 (1975), it has been recognized that the determination of who may be admitted to practice law before the highest court of a particular state is a matter to be decided under state law absent the imposition of some qualification which lacks "a rational connection with the applicant's fitness or capacity to practice law." This was followed by the Supreme Court of California as recently as 1980 in a reported bar admission case. Bib'le v. The State Bar of California, Committee of Bar Examiners, 26 Cal.3d 548 (Feb. 1980); certiorari denied 101 U.S. 163 (Oct. 1980).

Petitioner would have the Court now for the first time adopt a higher "middle tier" standard of equal protection analysis for review of State Bar admission requirements. The case law, however, does not support such "middle tier" review in other than, perhaps, gender related cases, and even if it did, the Committee of Bar Examiners' requirement that an applicant for admission obtain an overall passing score of 70% on the MBE and sections of the examination if taken at one administration, or a passing score (i.e., 70) on each section if attempted to be passed at different administrations, clearly passes equal protection scrutiny.

Petitioner asserts the Court should make this extraordinary change in the law because California has established a "multistage procedure for admission" and employed "discriminatory grading rules" in the "fourth and final examination." Peti-

tion for Writ of Certiorari to the Supreme Court of California, pp. 6-9. However, California does not have a "multistage procedure for admission" nor were "discriminatory grading rules" employed in grading petitioner's examination.

Petitioner does not say what "discriminatory grading rules" were employed against her. There is no allegation, nor can there be, that petitioner was discriminated against because of race, religion, national origin or sex.

It should be remembered that petitioner has repeatedly failed an examination that thousands have passed. Also, the "class" in which petitioner finds herself is one of her own choosing. In fall 1979, she passed the MBE but failed the essay examination. In spring of 1980, she had a choice of retaking the entire examination in either manner she believed, for whatever reason, would make the examination the easier to

pass. The decision was petitioner's; it was not the Committee's. Petitioner made her election and became a member of a particular class, i.e., one who has retaken only a portion of the examination and must therefore pass that portion without assistance from whatever score she might have obtained on past examinations. All applicants in this class must pass the same examination, and petitioner has not alleged otherwise. Petitioner attempts to compare her position with others who chose to take the entire examination - both the MBE and the essay - at one sitting. However, her position is not comparable.

While we can only speculate as to why any applicant would make either election, the reasons seem obvious. Those who take both portions of the examination have an opportunity to balance a deficiency on one portion of the exam with any surplus that might be earned on the other portion. How-

ever, there is obviously an increase in the physical, mental and emotional burdens on an applicant who attempts both parts of the examination at the same time as compared with what is obviously the less difficult burden of taking only one portion at a time. An applicant who elects to take only one portion has less days of examination to sit for.

In the spring of 1980, petitioner made her election and chose her own "class". Her examination papers and those of all other persons who elected to put themselves into that class were graded in an identical fashion, and the decisions as to whether or not they passed the bar examination were all made by the same standard. There was no "discrimination".

Also, it is clear that petitioner misconceives the nature of the California bar admission procedure. It is not a "multistage procedure for admission". There

are, it is true, multi-requirements for admission to the bar. All must be met in order to be certified for admission. These include being 18 years of age (§ 6060(a)), the demonstration of good moral character (§ 6060(b)), the completion of two years of college work or its substitute - passing an equivalency examination (§ 6060(c)), registration with the Committee upon commencing to study law (§ 6060(d)), graduation from a law school accredited by the Committee (§ 6060(e)(1)(2), or graduation from an unaccredited law school or study for four years in a lawyer's office or a judge's chambers (§ 6060(e)(3)), passage of the final bar examination (§ 6060(f)) and passage of the first-year law students' examination, except that this is not required of persons completing one year of study at an accredited law school (§ 6060(g)).

Petitioner was required to pass the college equivalency and first-year law students' examinations only because she could not meet the educational requirements of section 6060(c), and because she attended an unaccredited law school. Most applicants to the California bar attend accredited law schools and are not required to take either of these examinations.* Passage of these two examinations is not a "stage" in the "admission process" any more than completion of year-end examinations each year at an accredited law school would be so considered.

The Professional Responsibility Examination (PRE) is part of the final bar examination, although it is given by the National

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* In the fall of 1978, for example, the General Bar Examination was administered to 7,645 applicants. Of these, 6,099 were from accredited law schools and were not required to take the first-year law students' examination (or were exempted therefrom by satisfactorily completing the first year of law study at an accredited law school before transferring to an unaccredited school). 55 State Bar Journal 91 (Feb. 1980).

Conference of Bar Examiners. It may be taken at any time after a student has completed one year of law study. Rule XI, section 113, Rules Regulating Admission to Practice Law. The essay and MBE examination are the two parts of the General Bar Examination. They are usually taken together, and were taken together by the thousands of applicants who passed the examination the first time.

In short, California does not require applicants to take qualifying examinations over a period of time. California does require adequate legal education, demonstrated by attendance at an accredited law school or a satisfactory substitute, and passage of a final bar examination that consists of three parts. However, there is no particular order of taking the examinations required and, in fact, two of the three parts (the essay and MBE) are very often taken and passed at the same time.

It is respectfully submitted that the interest of the state in determining who is qualified to practice law before its courts requires the continued application of the rational basis test to state admission procedure.

III

THE COMMITTEE'S REFUSAL TO PERMIT BAR APPLICANTS TO PASS THE EXAMINATION BY COMBINING ARITHMETICAL SCORES OBTAINED ON SEPARATE ADMINISTRATIONS OF THE EXAMINATIONS HAS A RATIONAL BASIS AND SERVES A VALID STATE INTEREST.

There can be no doubt that California has a valid state interest in insuring that only qualified applicants are certified to the Supreme Court for admission to practice law. The testing procedure at issue in this proceeding helps to further that purpose by insuring, so far as possible, that persons are not admitted to practice law through a fluke.

The Supreme Court of California had before it in the proceedings below, the Declaration of Stephen P. Klein, Ph.D., an authority on educational testing and its measurement. Dr. Klein has served as consultant to the Committee for the past four years.*

As Dr. Klein stated: "... the policy of allowing applicants to transfer a passing status across administrations of the examination was adopted so as to allow those who failed only one of the two parts on a previous examination to concentrate their preparation time on the part they had failed." Klein Declaration, paragraph 7. "The requirement that only a passing status and not the score on a part be transferred across examinations was adopted so as to

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* The Declaration of Dr. Klein is appendix C to respondent's Memorandum in Response to Petition for Review filed in the proceeding before the Supreme Court of California.

prevent an applicant passing the General Bar Exam solely as a result of a chance flunctuation in scores." Klein Declaration, paragraph 9.

"Recognition that capitalizing on chance might lead to an erroneous overall pass/fail decision, even if only rarely, led to the requirement that the pass/fail status and not the score on a part be transferred across administrations." Klein Declaration, paragraph 17.

> "Finally, the old rule which required all applicants to take both parts of the examination on each administration was relaxed in 1978 to allow applicants to transfer a passing status on a part across administrations. The petitioner is requesting to relax this requirement still further by allowing the transferring of the scores themselves. Such liberalization cannot be justified on a statistical basis since it would result in capitalizing on any chance variation in the scores which in turn would jeopardize the reliability of the pass/fail decision-making process."

Klein Declaration, paragraph 21.

The statements in the Klein Declaration support a determination that the Committee's procedures which are here in issue serve a valid and legitimate state purpose; they prevent, so far as possible, chance playing a part in determining who is qualified to practice law.*

Petitioner makes no charge of fraud, imposition or coercision as reason for her failure to pass the examination. The Supreme Court of California has long held that,

> "... if any dissatisfied applicant can show that he was denied passage of the State Bar examinations through fraud, imposition, or coercision, or that in any other manner he was prevented from a fair opportunity to take the

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* Dr. Klein's analysis is born out by the facts in petitioner's case. As Dr. Klein shows, petitioner has taken the examination over 12 administrations. There are 108 different combinations of scores for petitioner on these administrations. If petitioner's best MBE and essays were summed, under current weighing of the examination parts, only two of the 108 combinations would yield a passing score. Only by capitalizing on the slight chance variation in scores across administrations would petitioner pass, and then only about one percent of the time. Klein Declaration, paragraphs 15 and 16.

> examination, this Court will be willing to listen to his complaint. Inability to pass the examinations, which are successfully passed by other applicants, will of course, not be inquired into by the Court."

Staley v. State Bar 17 Cal.2d 119, 121 (1941).

Petitioner has failed to pass an examination through either of the procedures authorized by the Committee; procedures that were applied to and met by thousands of other applicants.

Petitioner would now have this Court mandate a third procedure.

We urge the Court not to do so.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Dated: March 25, 1981

Respectfully submitted,

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Robert M. Sweet
Truitt A. Richey, Jr.
555 Franklin Street
San Francisco, California 94102

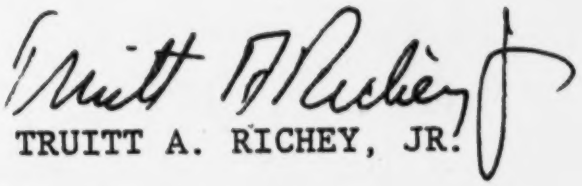
Attorneys for Respondent
The Committee of Bar Examiners of
The State Bar of California

CERTIFICATE OF SERVICE

The undersigned, a member of the Bar of the Supreme Court of the United States, certifies that three copies of the RESPONDENT'S BRIEF IN OPPOSITION have been served on counsel of record for the party herein by mailing same, first-class postage prepaid, this, the 1st day of April 1981, as follows:

Edward J. Horowitz
Suite 1015
11661 San Vicente Boulevard
Los Angeles, California 90049

All parties required to be served have been served.



TRUITT A. RICHEY, JR.

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No. 80-1446

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1446

No. 80-1446

IRENE LAVIN,

Petitioner,

v.

COMMITTEE OF BAR EXAMINERS OF THE STATE BAR OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

PETITIONER'S REPLY BRIEF

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1446

IRENE LAVIN,

Petitioner,

v.

COMMITTEE OF BAR EXAMINERS OF THE STATE BAR OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

PETITIONER'S REPLY BRIEF

INTRODUCTION

Each of the contentions presented by respondent Committee of Bar Examiners' Brief in Opposition to the Petition for Writ of Certiorari is adequately refuted by the Petition, with one exception. The exception arises because of a factual inaccuracy in the Brief in Opposition. This Reply Brief addresses that factual misstatement.

RESPONDENT MAY NOT RELY ON PETITIONER'S PRIOR KNOWLEDGE OF RESPONDENT'S DISCRIMINATORY GRADING RULES BECAUSE PETITIONER HAD NO SUCH KNOWLEDGE.

Respondent Committee argues the discriminatory grading rules applied to California's bar examination did not deprive petitioner of equal protection because she chose to take the examination in two parts, knowing of the different grading standards. Respondent Committee states:

> "Petitioner makes no claim that she was unaware of the Committee's standards nor that she was misled by the Committee." (Resp. Br. in Opp., p. 11.)

(Similar suggestions that petitioner was aware of the discriminatory grading rules are found at pages 7-8, 10-11 and 16-18 of Respondent's Brief in Opposition.)

These assertions and suggestions are flatly incorrect, as respondent Committee should be aware. Actually, petitioner had no knowledge prior to taking only the essay portion of the spring 1980 bar examination that discriminatory grading rules would be applied to those exercising such an option. Petitioner never received a copy of the 1979 notice concerning the differing rules and, in fact, was orally advised by a representative of the Committee that no penalties would be applied to applicants taking the examination in two parts.

Petitioner alleged the latter facts at page 7, lines 13-17, of her original petition to respondent Committee. That petition also specifically stated as follows:

> "As the [Committee's] instructions signed and dated November 17, 1979 referred to passing the examination in sections, petitioner telephoned the Los Angeles office of the Committee of Bar Examiners to inquire as to the

possible penalties which [might] be incurred if one elected to take the examination in sections. Positive assurances were received that there would be no detriment of any type, if such an election resulted." (Petn. to Comm., p. 5, lines 23-27.)

". . . . Believing in all good faith, that the information received was accurate, the petitioner justifiably relied on that information. In this circumstance, the petitioner received no other information from any source regarding the grading of the examination." (Petn. to Comm., p. 6, lines 3-6.)

Petitioner reiterated these facts in a letter seeking reconsideration of the Committee's ruling denying her original petition, as follows:

". . . . In November, 1979, she was informed she had passed the MBE [Multistate Bar Examination] with a score of 437, and could, if she so desired, repeat only the essay part of the bar examination. She was given no notice that her fall 1979 MBE score would not be used in calculating her total points on the spring 1980 examination. In fact, she was told by an employee of the Committee that she could take the essay part only, *without suffering any penalty* for not taking the combined examination. In reliance upon the representation made by the Committee's agent, and because the Committee gave no contrary notice, Ms. Lavin opted to take only the spring 1980 essay examination. . . ." (July 3, 1980 letter from petitioner to respondent

Committee, p. 2; emphasis in original.)[1]

Since petitioner was not aware of the discriminatory grading rules applicable to those who took the examination in two sections, respondent may not oppose her equal protection contentions on the basis of her prior knowledge of such rules.

Furthermore, even if petitioner had known of the discriminatory grading rules, a denial of equal protection should not be excused on the ground that the victim of the discrimination was aware in advance that it would occur. Petitioner is aware of no authority and respondent Committee cites none to the effect that prior knowledge would permit an equal protection waiver in these circumstances.[2]

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[1] Petitioner's original petition to respondent Committee and her July 3, 1980 letter were not incorporated into the California Supreme Court's record in this case and are therefore not part of the record certified to this Court. However, both respondent Committee and petitioner have copies of these documents in their files.

Petitioner did not recite these facts in her petition to this Court because the facts were not in the certified record. Nevertheless, petitioner is compelled to do so in this Reply Brief because of the factual misstatements in Respondent's Brief in Opposition.

Respondent's reference (at pages 7-8 and 10-11 of its Opposition) to Exhibit A of petitioner's petition to the California Supreme Court is misleading. That exhibit was a copy of respondent Committee's 1979 notice describing the differing grading rules to be applied to applicants taking the bar examination in separate sessions. The document was attached to the petition to the California Supreme Court as an illustration of the discriminatory grading rules. That petition did not allege petitioner had received such a document prior to taking the spring 1980 bar examination and, as stated above, petitioner had in fact never received such a document prior to taking the latter examination.

---

[2] Respondent's suggestion that a waiver of equal protection occurred here provides a separate issue worthy of consideration by this Court on a writ of certiorari.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the Petition for Writ of Certiorari, petitioner respectfully requests that a writ of certiorari issue and that the discriminatory grading rules applied to California's general bar examination be declared unconstitutional.

Respectfully submitted,

EDWARD J. HOROWITZ,
A Professional Corporation

By EDWARD J. HOROWITZ
Attorney for Petitioner

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 3340 Ocean Park Boulevard, Suite 3005, Santa Monica, California 90405: that on April 17, 1981, I served the within *Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Santa Monica, California, addressed as follows:

Clerk, U.S. Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(Hand delivered; forty copies)

Clerk, California Supreme Court
350 McAllister Street, Room 4050
San Francisco, California 94102

Herbert M. Rosenthal
Truitt A. Richey, Jr.
State Bar of California
555 Franklin Street
San Francisco, California 94102

Robert M. Sweet
State Bar of California
1230 West Third Street
Los Angeles, California 90017

I declare under penalty of perjury that the foregoing is true and correct. Executed on April 17, 1981 at Santa Monica, California.

Kirk W. Harney
(Original signed)